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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-127

WILLIAM T. SHERIS (DECEASED), EMPLOYEE
MAIDA LUDVIK SHERIS, WIDOW, *Et Al.*,
Petitioners,

v.

THE SHERIS CO., EMPLOYER
TRAVELERS INSURANCE COMPANY, INSURER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Virginia

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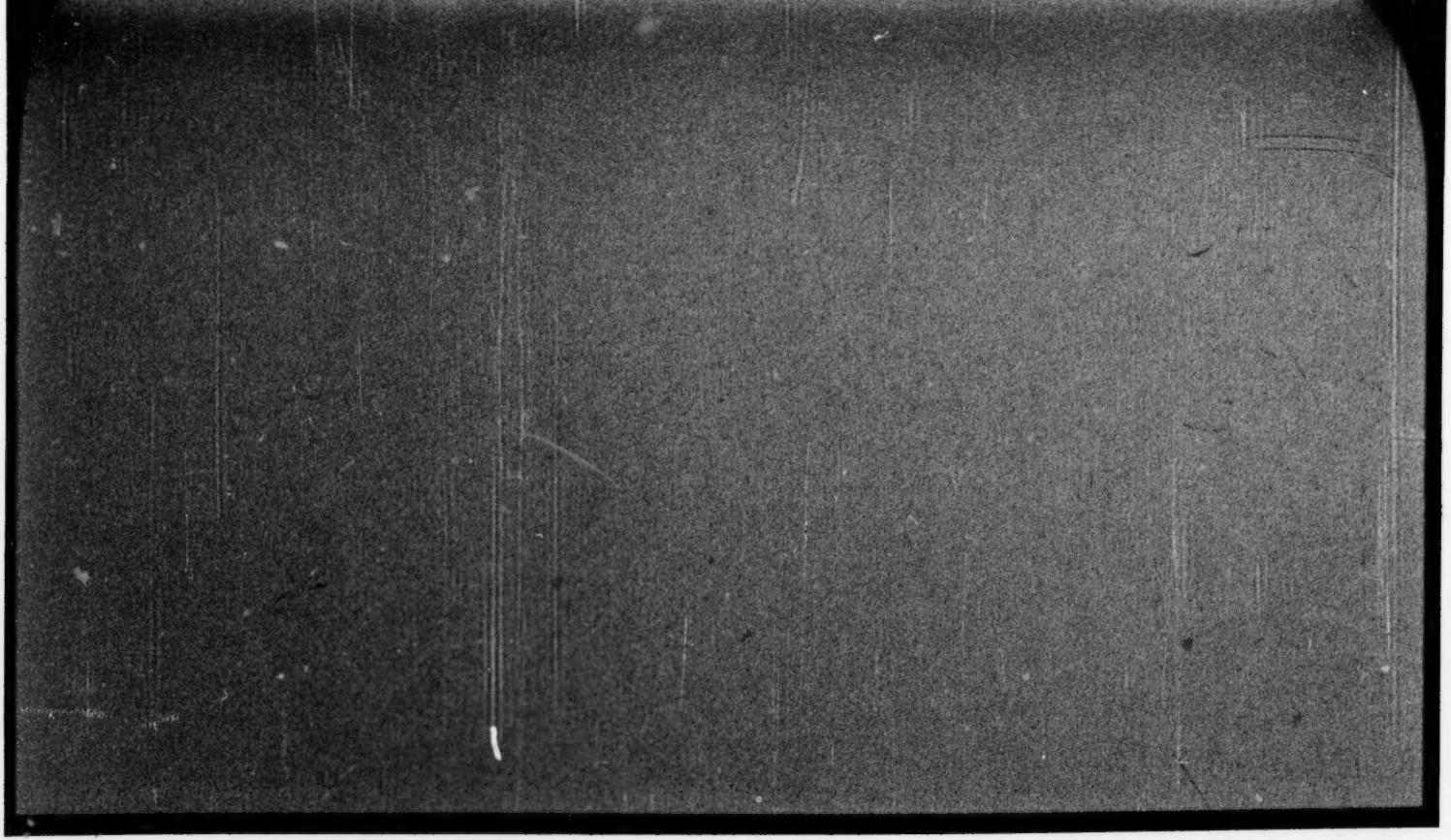

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No.

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THE SHERIS CO., EMPLOYER
TRAVELERS INSURANCE COMPANY, INSURER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Virginia

Petitioners pray that a Writ of Certiorari be granted and issued to review the judgment of the Supreme Court of Virginia entered in this cause on April 24, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 212 Va. 825 (1972). The opinion of the Industrial Commission of Virginia is also reported at 52 O.I.C. 232 (1970). A copy of each opinion is attached hereto and included in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Virginia was rendered on April 24, 1972. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1257(3) (1958 ed.).

QUESTIONS PRESENTED

Was the judgment of the Supreme Court of Virginia in its affirmance of the Industrial Commission's order terminating any further workmen's compensation benefits to the widow and dependent children of decedent who was killed in an air crash in international waters while in the course of his employment consistent with the mandate of the Supremacy Clause of the Constitution of the United States, and otherwise did the Court in reaching its decision properly construe and apply the Federal Death on the High Seas Act and a Treaty of the United States known as the Warsaw Convention where:

(a) the personal representatives recovered a judgment against the air carrier under a controlling federal statute which was designed for the benefit of certain beneficiaries specifically and exclusively designated by such statute;

(b) the action, although required to be instituted pursuant to federal law, was predicated upon the Warsaw Convention and certain supplemental agreements among international airlines providing that in the event of a passenger's injury or death the air carrier would be contractually liable within certain prescribed monetary limits without regard to fault; and

(c) the contractual character of the air carrier's undertaking and consequential contractual, as distin-

guished from tortious, liability was in the nature of a private insurance policy or in the form of an indemnity arising from the Warsaw Convention and as such was not subject to the subrogation rights of a workmen's compensation insurer.

CONSTITUTIONAL PROVISIONS, TREATY AND STATUTES INVOLVED

Article VI, Clause 2, of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention, 49 Stat. 3000-3026 (1934)), provides in pertinent part:

> Article 1(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.
>
> Article 1(2) For the purposes of this convention, the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or transshipment, are situated within the territories of two High Contracting Parties, or within the territory of a single High

Contracting Party, if there is an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.

Article 22(1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Death on the High Seas by Wrongful Act, 46 U.S.C. §§761-68 (1958 ed.), provides in pertinent part:

§761. Right of action; where and by whom brought.

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependant relative against the vessel, person, or corporation which would have been liable if death had not ensued. (Mar. 30, 1920, ch. 111, §1, 41 Stat. 537.)

§762. Amount and apportionment of recovery.

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and

shall be apportioned among them by the court in proportion to the loss they may severally have suffered by the reason of the death of the person by whose representative the suit is brought. (Mar. 30, 1920, ch. 111, §2, 41 Stat. 537.)

Virginia Code §65.1-41 (1950), as amended, provides:

The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable shall be held by the employer for the benefit of the injured employee or other person entitled thereto, less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees as provided in §65.1-43. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Industrial Commission and the injured employee or the personal representative or dependents of the deceased employee being first had and obtained.

STATEMENT OF THE CASE

This Petition seeks review and focuses upon the alleged statutory right of a workmen's compensation insurer to be subrogated to and thereby benefit by a judgment recovered by a decedent's personal representatives under a controlling federal statute. The action was instituted in order to obtain judicial approval of a settlement for the death of the decedent predicated exclusively upon the Warsaw Convention, as supplemented by a certain inter-carrier agreement among international airlines.(R. 27-29).

William T. Sheris, President of The Sheris Co., died while a passenger, and in the course of his employment, aboard a British European Airways flight which crashed with no survivors in international waters between the Islands of Rhodes and Cyprus on October 12, 1967. (R. 1-4.) He was survived by his wife and two minor daughters who are the Petitioners before this Court and were the workmen's compensation claimants before the Industrial Commission of Virginia.

In keeping with the agreement as to the payment of compensation in a fatal case, the Industrial Commission of Virginia on April 19, 1968, approved an Award of compensation at the rate of $45 per week for a period of 400 weeks payable to the widow and the surviving children, totaling $18,000. (R. 7-8). Workmen's compensation benefits were, accordingly, paid by the insurance carrier from October 13, 1967, until November 25, 1969, aggregating $5,040, at which time the insurer suspended payments and filed an application for hearing before the Industrial Commission, alleging that the Petitioners were about to conclude a court settlement against British European Airways arising from the death of the employee in an amount exceeding the compensation benefits to which the Petitioners were entitled

under the Virginia Workmen's Compensation Act. (R. 8-9).

This application of the insurance carrier followed the filing on September 23, 1969, of an action against the air carrier by the personal representatives of the decedent's estate in the United States District Court for the Eastern District of Virginia. (R. 37-42).

The action was instituted under the Federal Death on the High Seas Act and alleged that the death of the Employee had been caused by the "wrongful act, neglect or default" of the air carrier in that both under the airline's contract of carriage and its special contracts it had breached its warranty of safe passage given to the decedent for his benefit and in the event of his death for the exclusive benefit of the statutory classes of those members of his family who survived him. (R. 38-39). The suit was brought in order to afford protection to British European Airways Corporation from any contingent claims that might otherwise arise in view of the minority of the decedent's children and the interest claimed by the insurer. (R. 38). The source of the recovery, however, had its underpinnings on the Warsaw Convention and certain supplemental contracts of carriage entered into among international air carriers in which, upon adequate proof of damages, they had agreed to compensate the families of fatal air crash victims in a sum not to exceed $75,000, regardless of fault. (R. 27-39).

On December 12, 1969, the District Court entered judgment in favor of the personal representatives and against British European Airways Corporation in the amount of $75,000. Under the terms of the judgment and pursuant to the provisions of the Death on the High Seas Act, the proceeds were distributed to the widow, dependent children and mother of the deceased

employee. (R. 35-36). However, the sum of $5,040 from the widow's share was deposited into the Registry of the District Court there to await the entitlement, if any, of the workmen's compensation carrier who had earlier asserted a claim against the proceeds for reimbursement of the payments theretofore made. (R. 36).

In due course, the application of the workmen's compensation carrier to terminate the payment of future benefits came on to be heard before Deputy Commissioner Rushbrooke on March 30, 1970. At this juncture, the Deputy Commissioner requested that the respective parties submit briefs on the legal points involved. (R. 10-13). Thereafter, Petitioners submitted their brief to the Industrial Commission asserting that the Death on the High Seas Act was explicit and controlling both as to federal jurisdiction and the parties who may benefit thereunder. Thus, the issue of the proper construction of a federal statute and the supremacy of the laws of the United States were raised initially before the Deputy Commissioner of the Industrial Commission of Virginia. (14a). Also, Petitioners asserted that pursuant to the Warsaw Convention and the supplemental air carrier agreements that the recovery was substantively grounded upon the contract of carriage and the workmen's compensation carrier was not entitled to benefit directly or indirectly from the proceeds of judgment secured in the District Court.

Subsequently, the Deputy Commissioner by Award entered September 24, 1970, relieved the compensation insurer of any further obligation to pay compensation benefits. (14a-19a). In his opinion, the Deputy Commissioner ruled that by virtue of the judgment secured against the air carrier, Petitioners had obtained one full recovery as provided by the Virginia Workmen's Compensation sta-

tute and that the insurer thereby became entitled to its right of subrogation under Virginia law. (18a).

Petitioners thereupon took a timely appeal to the full Industrial Commission and resubmitted its brief which had earlier raised the federal issues involved. On appeal from the Deputy Commissioner's Award, it was affirmed by the full Commission on April 22, 1971, without opinion. (19a).

From this final Award of the Industrial Commission, Petitioners sought leave to appeal to the Supreme Court of Virginia. On October 12, 1971, the Supreme Court of Virginia granted the allowance of an appeal. Once more, Petitioners briefed and preserved the substantial federal questions which were raised below in their appeal to the Supreme Court of Virginia. (22a-23a). Petitioners reasserted their position that the Federal Death on the High Seas Act was exclusive as to the beneficiaries who could participate in a recovery thereunder; that permitting a workmen's compensation carrier to terminate its payments would be a construction violative of the clear intendment of the statute; and that the basis of the recovery—not the source of the authority to establish it—was expressly founded upon the Warsaw Convention.

On April 24, 1972, the Supreme Court of Virginia affirmed the order of the Industrial Commission holding that the recovery by the decedent's personal representatives was based in tort and that the compensation carrier was entitled to its right of assignment and subrogation under the Virginia Workmen's Compensation Act. (13a-14a). The Virginia Court further assessed costs against your Petitioners and awarded damages in favor of the compensation carrier in the sum of $30. (20a).

It is from this final judgment of the Supreme Court of Virginia that this Petition for a Writ of Certiorari has followed.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE SUPREMACY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES AND THE STATUTORY CONSTRUCTION OF THE FEDERAL DEATH ON THE HIGH SEAS ACT.

In this case, the Supreme Court of Virginia has decided a substantial federal question which has not been previously decided by this Court nor by the courts of any other jurisdiction. It presents a novel question as to the interplay between a state workmen's compensation statute, the Warsaw Convention and a federal maritime enactment.

The judgment obtained by the decedent's personal representatives was derived from the provisions of the Death on the High Seas Act which was essentially used as a means of approving a settlement against the air carrier due to the minority of the decedent's surviving children and the claim made by the compensation insurer. 46 U.S.C. §§761-68 (1958 ed.).

On its face, the federal statute clearly and without equivocation recites that a suit for damages arising from the death of a person beyond a marine league from the shores of the United States must be maintained in admiralty "*for the exclusive benefit* of the decedent's wife, husband, parent, child or dependent relative. . . ."[1]

[1]Section 761 arrests any different construction, in words of limitation reciting that "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the *exclusive benefit* of the decedent's wife, husband, parent, child or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued." [Emphasis added.]

46 U.S.C. §761 (1958 ed.) [Emphasis added.] Moreover, the statute prescribes that the recovery in such a suit shall constitute a fair and just compensation for the pecuniary loss sustained by the decedent's family and "shall be apportioned among them by the Court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought." 46 U.S.C. §762 (1958 ed.)

Thus, it is manifest that it was not the intention of Congress to permit a workmen's compensation carrier or any other person to benefit from a recovery under the Death on the High Seas Act. The recovery is statutorily confined to the various classes of beneficiaries incorporated within its provisions. However, the Supreme Court of Virginia in its affirmance of the Industrial Commission's Order has permitted a compensation carrier to participate in the proceeds of judgment designed for the sole benefit of the decedent's family. Consistent with the judgment entered by the District Court, the sum of $5,040 was deposited into the Registry of that Court to await the entitlement thereto, if any, of the workmen's compensation carrier. By its decision, the Supreme Court of Virginia has directly authorized the carrier to profit and, hence, be reimbursed from the recovery obtained by the decedent's personal representative; and to be relieved of the remainder of the $18,000 compensation award, solely because of the settlement based on the Warsaw Convention and awarded under the Federal Death on the High Seas Act.

Within this context, an important and pressing constitutional question has evolved in that the Virginia Court's ruling infringes upon the mandate of the Supremacy Clause of the Constitution. U.S. Const. art.

VI, cl. 2. In the circumstances, the Virginia Workmen's Compensation statute, allowing the carrier certain subrogation rights, falls squarely into conflict with an overriding federal statute that affords not only exclusive jurisdiction but more significantly exclusivity as to those persons who may benefit thereunder.

As early as *Gibbons v. Ogden*, 9 Wheat 1 (1824), Chief Justice Marshall stated the governing principle—that "acts of the State Legislature . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the constitution," are invalid under the Supremacy Clause. *Id.* at 211. [Emphasis added.] See *Perez v. Campbell*, 402 U.S. 637 (1917); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967); *Free v. Bland*, 369 U.S. 663 (1962).

Likewise, in *McCulloch v. Maryland*, 4 Wheat 316 (1819), the Supremacy Clause was also construed to the effect that the states were devoid of any power "to retard, *impede*, burden or *in any manner control, the operations of the constitutional laws enacted by Congress* to carry into execution the powers vested in the general government." *Id.* at 436. [Emphasis added.]

In the present situation and due to the absence of congressional implementation of the Warsaw Convention, 49 Stat. 3000-3026 (1934), it was necessary for the decedent's personal representatives to bring their action against the air carrier under the Death on the High Seas Act inasmuch as it has been held that the Warsaw Convention does not create an independent right of action. See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2nd Cir. 1957), *cert. denied*, 355 U.S. 907. The remedy afforded by the Convention is not, however, to be found in any state wrongful death act. The death here occurred on the high seas beyond a marine league

from the shore of any state and not within the territorial waters of the United States. In this setting, it is well established that the Death on the High Seas Act conferred exclusive admiralty jurisdiction on the federal court to determine the claim of the personal representatives[2] and to apportion the recovery among those for the exclusive benefit of whom such an action may be brought, all as expressly described in the Act. The action, therefore, had to be brought by the personal representative of the deceased employee for the exclusive benefit of those members of his family who survived him.

The Supreme Court of Texas in a cogent analysis of the federal statute here involved has observed:

> The 'personal representative' who asserts a course of action under . . . the Death on the High Seas Act is not suing for the benefit of the decedent's estate or as a representative thereof, nor does any amount which the 'personal representative' may recover become an asset of the estate. The Probate Court has no interest in either the claim or damages recovered thereunder. . . . The 'personal representative' *sues as trustee for the benefit of those for whom the statute authorizes recovery.*

Mandell & Wright v. Thomas, 441 S.W.2d 841, 844-45 (Tex. 1969). [Emphasis added.]

This compelling digest should lay to rest any doubt that the Death on the High Seas Act was enacted by Congress to restrictively benefit the family survivors of a decedent and no other person.

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[2] *The Tungus v. Skovgaard,* 358 U.S. 588 (1959); *Berry v. Pacific Sportfishing, Inc.,* 372 F.2d 213 (9th Cir. 1967); *First Nat'l Bank in Greenwich v. National Airlines,* 288 F.2d 621 (2nd Cir. 1961), *cert. denied,* 368 U.S. 859; *Jennings v. Goodyear Aircraft Corp.*, 227 F. Supp. 246 (D. Del. 1964).

The Virginia Courts were without jurisdiction of the remedy afforded by the statute which reserved the action to the sole purview of a federal court. Further, the language carefully selected by Congress is without ambiguity, in plain and unmistakable terms excluding any but those classes of beneficiaries named from sharing in a recovery under the Act. The Death on the High Seas Act does not purport to and obviously was not intended to profit or advantage a compensation carrier in the manner provided in the Virginia Workmen's Compensation Act or in any manner. To include the compensation carrier within the classes of family beneficiaries specifically designated in the Act would be tantamount to a rewriting of its unequivocal language. This, however, is precisely the course that the Supreme Court of Virginia has elected to follow.

The construction given the Act by the Supreme Court of Virginia stands as a direct "obstacle to the accomplishment and execution of the *full purposes and objectives of Congress.*" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). And see *Nash v. Florida Indus. Comm'n, supra.*

In *Higa v. Transocean Airlines*, 230 F.2d 780, 785 (9th Cir. 1955), the Court aptly described the fundamental features of the statute in question:

> [T]he Death on the High Seas Act creates the right to recover for wrongful death and designates not only the federal court for its enforcement, but a particular jurisdiction of that court. *The right is a matter of federal law where state courts would have no special competence.* There is more here than 'the grant of jurisdiction, of itself . . .' which indicates that jurisdiction was intended to be exclusive.

So, too, we should add were the beneficiaries enumerated by the statute.

The construction afforded the federal statute by the Supreme Court of Virginia does violence to its plain and simple language and as such effectively interferes in an area which has been correctly entrusted by Congress to federal supervision. The Supremacy Clause of the Constitution requires that a state law should not frustrate the operation of a valid federal enactment, and, therefore, the application under these conditions of the Virginia Workmen's Compensation Act is a direct and impermissible interference with the intentions of Congress.

On this ground alone, the intrusion of the Virginia Workmen's Compensation Act into Petitioner's recovery under the Federal Death on the High Seas Act should not be allowed to stand. The construction of the federal statute by the Virginia Court interferes with and is in derogation of the explicit purpose and policy of Congress and should be reviewed by this Court. In this posture, the Virginia Workmen's Compensation Act must yield.

II. THE WARSAW CONVENTION–THE FEDERAL NATURE AND CONTRACTUAL CHARACTER OF PETITIONERS' RECOVERY.

The judgment recovered by Petitioners in the Federal District Court was circumscribed by the provisions of the Warsaw Convention[3] and as earlier mentioned, the personal representatives of the decedent were compelled

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[3] 49 Stat. 3000-3026. The official title is *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, hereinafter sometimes referred to as the Convention or Treaty.

The Convention was concluded at Warsaw, Poland, on October 12, 1929, and proclaimed by the President on October 29, 1934. Over 90 countries have become signatories to the Convention.

to establish this right under the Convention by a suit instituted under the Death on the High Seas Act. This form of procedure was dictated by federal decisions, although not decided by this Court, that the Convention does not create an independent cause of action. See, *e.g.*, *Noel v. Linea Aeropostal Venezolana, supra.; Notarian v. Trans World Airlines,* 244 F. Supp. 874 (W.D. Pa. 1965).

The opinion of the Supreme Court of Virginia mistakenly concludes that Petitioners' recovery was in tort and thereby operated to permit the workmen's compensation carrier to avail itself of its statutory right of subrogation. The decision, therefore, further poses an additional federal question of substance not heretofore determined by this Court. The disposition below touches upon an important area of federal law which should be settled by this Court inasmuch as the decision would appear to be at variance with an impressive grouping of federal decisional precedents.

The Warsaw Convention and the Death on the High Seas Act have no interdependence with the Virginia Workmen's Compensation Act. The Virginia Court by so interpreting the Death on the High Seas Act has done so in a manner not only in conflict with the federal statute under which the action was brought but misconstrues the nature of Petitioners' recovery under the Convention and those supplemental inter-carrier agreements made pursuant to Article 22(1) of the Treaty.[4] The nature of

[4]On November 15, 1965, the United States sent a notice of denunciation to the Polish Government stating that this country opposed the Warsaw Convention's low limits on liability for personal injuries, and would withdraw from the Convention at the end of six months pursuant to Article 39, 49 Stat. 3022. The State Department made it known, however, that the denunciation would be withdrawn if the world's international air carriers agreed to raise

Petitioners' recovery was founded upon a multi-lateral treaty to which the United States is an adherent. In this position and consistent with authoritative statutory and decisional law, the judgment entered by the District Court accorded with the limits of liability established by the interim agreement among the air carriers, including the air carrier here involved. (R. 27-29, 32).

That inter-carrier agreement supplemented and was made pursuant to Article 22(1) of the Convention which provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability" than that otherwise provided by the Convention. (R. 24). As approved by order of the Civil Aeronautics Board dated May 13, 1966 (R. 23-27), the agreement recites in pertinent part:

> [F]or death of or personal injury to passengers [recovery] is limited . . . to proven damages not to exceed US DOLLARS 75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. (R. 28).

In its press release distributed under date of May 31, 1967 (R. 30), the Civil Aeronautics Board explained:

> The carriers participating to the Agreement provide increased liability limits up to $75,000 for provable

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the limitation first to $75,000 and ultimately to $100,000. There followed an interim agreement reached among the carriers in the spring of 1966 providing for increased limits of liability not to exceed $75,000 inclusive of costs of litigation, *under conditions of absolute liability.* On May 14, 1966, the United States withdrew its previous notice of denunciation. See *The Warsaw Convention–Recent Developments and the Withdrawal of the United States Denunciation,* 32 J. Air L. & Com., No. 2, p. 243 (1966). [Emphasis added.]

> damages and agree to waive defenses available under the Convention, *thus accepting the principle of liability without fault.* [Emphasis added.]

The federal courts have consistently recognized the contractual composition of the undertaking. Thus, in *Notarian v. Trans World Airlines, supra* at 877, it was held that "the [Warsaw] Convention's provisions are contractual in nature as they affect carriers by air and their passengers . . . ." And further,

> The applicability of the Convention undeniably is premised upon a contract, but on a contract of a particular kind. It is based on a contract of carriage that arises from the relationship between a "carrier" and the passengers. This contractual relationship requires only that the carrier consent to undertake the international transportation of the passenger from one designated spot to another, and that the passenger in turn consent to the undertaking. [T]he passenger's cause of action under the Warsaw Convention is based on this contract of carriage (the sale and purchase of transportation), *not on any tort theory.*

Block v. Compagnie Nationale Air France, 386 F.2d 232, 330-31 (5th Cir. 1967), *cert. denied,* 392 U.S. 905. [Emphasis added.]

And these contractual provisions are prescriptive of an absolute liability. *Lisi v. Alitalia-Linee Aeree Italiane,* 370 F.2d 508 (2nd Cir. 1966), *aff'd,* 390 U.S. 455; *Grey v. American Airlines,* 227 F.2d 282 (2nd Cir. 1955), *cert. denied,* 350 U.S. 989.

Upon delivery of a ticket to an international passenger, and as an integral part of its conditions, the air carrier is required to give written notice of the limits of liability established by the inter-carrier agreement. As aptly stated

in *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965):

> The purpose of such a statement is to notify passengers of the applicability of the Convention, thus affording them an opportunity to take steps to protect against the limitation of liability. The most common self-protection measure is, of course, the procurement of additional flight insurance.

Id. at 497.

Similarly, *Lisi v. Alitalia-Linee Aeree Italiane, supra* at 513, describes the purpose of the notice to give the passenger the "opportunity to purchase additional flight insurance. . . ."

The inter-carrier agreement itself states at the end of paragraph 2 thereof that:

> Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. . . . (R. 28-29).

The words "additional flight insurance" and the words "additional protection" in the frameworks respectively quoted above import insurance united with or joined to insurance formerly purchased and forming one aggregate. By necessary implication, these phrases presuppose that the protection purchased by a passenger under its special contract of carriage must in the first place be insurance protection. Otherwise, the insurance purchased from a private company could not be "additional protection" or "additional flight insurance."

It follows that the judgment of the District Court was not patterned upon traditional concepts of tort liability, being the standard upon which a compensation carrier may invoke its right to subrogation under a state workmen's compensation act.

Contrariwise, the judgment was founded upon a contractual liability having all the elements of a private insurance contract or at the very least a contract of indemnity between the passenger and the airline. In essence, the agreement was one by which the air carrier for consideration promised to pay money to the decedent-passenger or his beneficiaries in the event of death or injury during the course of carriage. In this sense, the contract was one of insurance. See 43 Am. Jur.2d, *Insurance* §1 (1969).

In its probing review of the Convention by the *Block* Court, it noted that the contractual liability sprung from the non-performance of the obligation flowing from the contract of air transport in which third persons possess the status of simple contracting parties and the air carrier assumes to carry the passengers with "absolute security throughout the journey. Such obligation even without being specifically stipulated subsists, and in the case of non-performance places the carrier in the role of a *contractual debtor and the passenger as his creditor.*" *Block v. Compagnie Nationale Air France, supra* at 331-32 n. 22. [Emphasis added.]

Thus, it cannot be gainsaid that the recovery, although rooted upon a controlling federal statute, was forged primarily upon a contract of carriage emanating from the Treaty.

Within this context, the substance of the right upon which the family was paid—the Warsaw Convention, rather than the means of recovery—the Death on the High Seas Act—should have been the only criterion upon which the Virginia Court should have resorted and, in so doing, should have precluded the compensation carrier from any participation in the recovery.

In a not dissimilar situation, this Court has declared that "the federal nature of the right to be established is decisive—not the source of the authority to establish it." *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). And see *Gully v. First Nat'l Bank*, 299 U.S. 109, 116 (1936). Applying this principle to the instant case, Petitioners' recovery was structured upon federal law—the Warsaw Convention and, hence, it was from that Treaty which determined the federal nature of Petitioners' right to assert a claim for the decedent's death. In this light, the Virginia Court's decision is not in accord with several lower federal cases interpreting the remedy afforded by the Convention and likewise is in direct conflict with a treaty of the United States. Accordingly, the decision of the Supreme Court of Virginia must not be allowed to persist under the Supremacy Clause of the Constitution. U.S. Const. art. VI, cl. 2.

In tandem, this Court has also held that "the *right* or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they received another. . . ." *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 597 (1949).

The Petitioners' right to relief was based upon and arose from the Convention. The erroneous construction placed upon the Convention's remedial provisions and the Death on the High Seas Act by the Supreme Court of Virginia has infringed upon an area entrusted to the primacy of federal law. The decision, therefore, possesses those substantive federal requisites necessitating a plenary review by this Court.

CONCLUSION

Wherefore, it is respectfully submitted that for the foregoing reasons a Petition for a Writ of Certiorari be granted to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF VIRGINIA

Present: All the Justices

MAIDA LUDVIK SHERIS, *et al.*,

v. Record No. 7831

THE SHERIS CO. AND
TRAVELERS INSURANCE COMPANY

OPINION BY JUSTICE ALBERTIS S. HARRISON, JR.
Richmond, Virginia, April 24, 1972

ON APPEAL FROM THE INDUSTRIAL
COMMISSION OF VIRGINIA

William T. Sheris, president of The Sheris Company, died on October 12, 1967 while a passenger on a flight of British European Airways Corporation (BEAC) which crashed into the Aegean Sea. It is agreed that his death arose out of and in the course of his employment by his company. As a result the Industrial Commission of Virginia (Commission) awarded compensation to Mrs. Maida Ludvik Sheris, his widow, for the joint and equal use of herself and two infant children.

Compensation was paid to the dependents of decedent from the date of his death through November 25, 1969, at which time the Travelers Insurance Company filed its application with the Commission for a hearing. It alleged

that the dependents were in the process of settling with BEAC a third party claim arising out of Sheris' death and for an amount in excess of the benefits to which they would be entitled under the Virginia Workmen's Compensation Act. The Commission found that a settlement had been made and that BEAC was "an other party" under the provisions of Code § 65.1-41 and as such it and its insurance carrier, The Travelers, were subrogated to any rights the personal representative of the Sheris estate could assert against BEAC on account of the death of decedent. The Commission further found that the dependents of the deceased employee had each received one full recovery, and ordered that the outstanding award of the Commission be vacated and set aside as of November 25, 1969. The widow, mother and children of William T. Sheris, deceased, appeal this final award entered by the Commission.

Appellants contend that their recovery from BEAC under the Death on the High Seas Act was predicated upon the Warsaw Convention and certain supplemental agreements among international airlines providing that in event of a passenger's injury or death the air carrier would be contractually liable within certain monetary limits without regard to fault; that their recovery was by virtue of the contractual character of the air carrier's undertaking and as a consequence was contractual as distinguished from tortious; and that the liability of BEAC was the equivalent of liability under a private insurance policy, and therefore not subject to the subrogation rights of a workmen's compensation insurer.

Appellees contend that the recovery was for the wrongful act, neglect or default of BEAC—a recovery for negligence, wrong and breach of duty. It argues that BEAC is the party responsible for the death of Sheris and

that the policy behind subrogation is to allow an employer's compensation carrier to recover the amount it has paid from another party who is responsible. They say that appellants, having had one full recovery, are not entitled to any further compensation under the Virginia Workmen's Compensation Act.

Code §65.1-41 provides in part:

"The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party."

Code §65.1-112 provides:

"When any employer is insured against liability for compensation with an insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all the rights and duties of the employer and may enforce any such rights in its own name or in the name of the injured employee or his or her personal representative; provided, however, nothing herein shall be construed as conferring upon the insurance carriers any other or further rights than those existing in the employer at the time of the injury to his employee, anything in the policy of insurance to the contrary notwithstanding. No compromise settlement shall be made by the insurance carrier in the exercise of such right

of subrogation without the approval of the Industrial Commission and the injured employee or the personal representative or dependents of the deceased employee being first had and obtained."

The Death on the High Seas by Wrongful Act, 46 U.S.C.A. §§ 761-68 (1959 ed.) provides, in part:

"§ 761. Right of action - where and by whom brought. -

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependant relative against the vessel, person, or corporation which would have been liable if death had not ensued. (Mar. 30, 1920, ch. 111, §1, 41 Stat. 537.)"

Subsequent to the award which was made by the Commission the executors of the Sheris estate filed their complaint in the U.S. District Court for the Eastern District of Virginia against BEAC, The Travelers and the widow, children and mother of the decedent. Jurisdiction was alleged under the provisions of the Death on the High Seas Act. Travelers was made a party defendant because of its subrogation claim, the validity of which was denied by the plaintiffs. The widow, children and mother were allegedly the parties entitled to the recovery and made parties for that reason. In paragraphs 7 and 8 of the complaint it was alleged:

"That the death of said William T. Sheris was caused by the wrongful act, neglect or default of the

defendant, British European Airways Corporation, in that under both its contract of carriage and the special contracts hereinafter mentioned, it breached its warranty of safe passage given to the plaintiff for his benefit and in the event of his death for the exclusive benefit of those members of his family on whose behalf this action is filed.

"That by virtue of certain special contracts of carriage to which the defendant, British European Airways Corporation, is signatory and which were entered into under the provisions of a treaty known as the Warsaw Convention, as amended by the Hague Protocol, the liability of the defendant, British European Airways Corporation, is limited in the circumstances here present to proven damages not to exceed the sum of Seventy-Five Thousand Dollars ($75,000.00)."

The plaintiff sought to recover the sum of $75,000 damages, the maximum liability of BEAC under the provisions of a treaty known as the Warsaw Convention, as amended by the Hague Protocol, to which BEAC is a party signatory. Judgment was entered against BEAC in the full sum claimed, and the order provided that upon payment it would be forever released and discharged of all claims or causes of action against it arising out of the death of William T. Sheris. From the recovery $69,960 was distributed to the surviving dependents, and the balance, $5,040, was paid into the registry of the court, there to await a final determination of the entitlement thereto, if any, of The Travelers.

The Warsaw Convention was the result of two international conferences, one held in Paris in 1925 and the other in Warsaw in 1929. The United States was not one of the original participating parties, but it adopted the Convention by proclamation of the President of the

United States on October 29, 1934 in accordance with Congressional authority. 49 U.S. Stat. 3000 *et seq.* The purpose of the Conference was two-fold. Because aviation linked many countries with different legal systems it was desirable to establish a certain degree of uniformity. The Conference achieved this as to documentation, tickets, waybills and the like. The second goal was to limit the potential liability of the carrier in case of accidents in return for which it would limit its defenses. The Conference established a limitation of liability which then amounted to approximately $4,898.

This limit remained in effect until September, 1955 when a treaty known as The Hague Protocol was formulated. The treaty merely raised the limit to $16,582. While it became operative on August 1, 1963 the United States did not ratify it and gave notice that it would denounce the Warsaw Convention unless the airlines serving the United States agreed by contract to a $75,000 liability limit. The denunciation was announced, but before it became effective the airlines acceded to increased liability. At this time the International Air Transport Association brought about an arrangement among air carriers having landing privileges in the United States which increased the limitations of liability of the signatory airlines to $75,000 per passenger for death or injury in international flight regardless of their negligence. This agreement, commonly known as the Montreal "Interim Agreement," was approved by the Civil Aeronautics Board on May 13, 1966, and the United States withdrew its notice of denunciation. *See* Kennelly, *Problems Regarding Aviation Litigation,* 20 *De Paul L. Rev.* 436 (1971); Note, *The 1966 Carrier Agreements: The United States Retains the Warsaw Convention,* 7 *Va. J. Int'l. L.* 140 (1966).

As was observed in *Gray v. American Airlines,* 227 F.2d 282, 285 (2d Cir. 1955), "[t]he scheme of the Warsaw Convention is pretty plain on its face. . . . Article 17 imposes an absolute liability upon the carrier for all personal injuries, regardless of fault, 'if the action which caused the damage so sustained took place on board the aircraft.' "

This agreement by the carriers to waive their defenses results in absolute liability. Although the claimant must prove the amount of damages sustained up to $75,000 the need for litigation of fault is eliminated unless the plaintiff seeks an unlimited recovery for failure to give notice or for willful misconduct. The limitation of the carrier's defenses was agreed to as a *guid pro quo* for limiting the liability of the carriers.

It is apparent from appellants' brief that they rely on the language of the Warsaw Convention to sustain their position. However, as was said in *Notarian v. Trans World Airlines, Inc.,* 244 F. Supp. 874, 877 (W.D. Pa. 1965):

> "The Warsaw Convention does not create an independent right of action. *Noel et al. v. Linea Aeropostal Venezolana,* [247 F.2d 677 (2nd Cir. 1957), *cert. denied* 355 U.S. 907]. While the Warsaw Convention determines where actions resulting from international airplane flights should be litigated, it refers only to national boundaries and not to places within the boundaries of countries. *Pitman v. Pan American World Airways, Inc.,* D.C., 223 F. Supp. 887, 888, 1963."

Numerous decisions establish that the Warsaw Convention does not create an independent right of action but only a presumption of liability leaving it for local law to grant the right of action. In *Noel v. Linear Aeropastal Venezolana, supra,* at p. 679, there is a

quotation from Orr, *The Warsaw Convention*, 31 *Va. L. Rev.* 423 (1945) that the purpose of the Convention was only "to affect a uniformity of procedure and remedies."

It is an established principle of maritime law that in the absence of a statute, there is no action for wrongful death. "The Death on the High Seas Act was enacted to fill a void in the maritime law which was found to exist by the Supreme Court in *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886). The Act provides an admiralty remedy for wrongful death where none existed before." *King v. Pan American World Airways*, 270 F.2d 355, 362 (9th Cir. 1959). In fact, appellants concede that the Death on the High Seas Act conferred exclusive admiralty jurisdiction on the federal court to determine the claim of the executors of Sheris.

There is essentially no difference in form, pleading or proof between an action brought under the Death on the High Seas Act and an action brought under Virginia's Wrongful Death Statute. However, appellants claim their recovery from BEAC was not a claim against a negligent third party and was not patterned upon the traditional concepts of tort liability. They say it was founded upon a contractual liability, created by the purchase of a ticket, having all the elements of a private insurance contract. They further say the contract, whereby BEAC agreed to transport Sheris, was one by which the air carrier, for consideration, promised to pay money to the decedent-passenger, or his beneficiaries, in the event of injury or death to Sheris during the course of the carriage. And in that sense, they argue the contract was one of insurance and cite *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330-31 (5th Cir. 1967) where it was said:

> "The applicability of the Convention undeniably is premised upon a contract, but on a contract of a

particular kind. It is based on a contract of carriage that arises from the relationship between a 'carrier' and the passengers. This contractual relationship requires only that the carrier consent to undertake the international transportation of the passenger from one designated spot to another, and that the passenger in turn consent to the undertaking. In a charter situation the passenger's cause of action under the Warsaw Convention is based on this contract of carriage (the sale and purchase of transportation), not on any tort theory."

The critical issue in *Block* was whether the Warsaw Convention was applicable to international transportation of passengers under contract of carriage on "voyage" charter flights. In holding that the Convention was applicable the court further said in its opinion:

> "The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the carrier and the passenger carry out the Conference goal that *the rules of limited liability be known to both parties. This knowledge enables the passenger to determine in advance the amount of insurance he needs;* permits the carrier's insurer to gauge the carrier's long-term risk, and act accordingly; and, finally, advises the carrier as to what law it need conform its transportation documents." (Emphasis supplied.) 386 F.2d at 333-34.

Appellants state that the language in the Death on the High Seas Act, "wrongful act, neglect or default," includes something more than the traditional precepts of negligence, *McLaughlin v. Blidberg Rothchild Co.*, 167 F. Supp. 714, 715 (S.D. N.Y. 1958), and that the language has been construed to include an action for breach of implied warranty. *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D. N.Y. 1960).

However, in *Montgomery v. Goodyear Tire and Rubber Co.*, 231 F. Supp. 447, 454 (S.D. N.Y. 1964), it was said:

> "Moreover, the recent trend in personal injury and death cases based on warranty has been to treat the action as one in the nature of tort, ignoring contract considerations. [Citing cases.]"

Obviously when Sheris purchased a ticket from BEAC he purchased transportation from point of departure to point of destination, and implied in this purchase was the agreement and duty of the carrier to transport him safely. Its failure to do so constituted a breach of that agreement and duty, and a wrongful act, neglect or default. In effect a carrier says to its passenger, upon proper delivery of a ticket which contains the required information, "If we breach our duty to transport you as agreed, and you or your estate sue to recover damages, it is agreed that the amount of damages that can be recovered from us for your injury or death is limited to a maximum of $75,000, but no negligence on our part has to be established as a prerequisite to a recovery." Such an agreement contains none of the basic elements of an insurance contract. It is exactly what it purports to be, a waiver of certain defenses in return for a limitation of liability in event of an action alleging a breach of duty and damages therefrom.

Appellants cite *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2nd Cir. 1966), *aff'd.*, 390 U.S. 455 and *Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965). In these cases the court reviewed the provisions of the Warsaw Convention which specify that if a carrier accepts a passenger without a passenger ticket having been delivered, it shall not be entitled to avail itself of provisions of the Convention limiting liability. Appellants point to the following language in *Warren*:

"It is part of an Article of the Convention in which the particulars to be contained in the passenger ticket are spelled out in detail. One of these particulars, contained in Article 3(1)(e) is the inclusion of a statement '* * * that the transportation is subject to the rules relating to liability established by this convention.' The purpose of such a statement is to notify passengers of the applicability of the Convention, thus affording them an opportunity to take steps to protect against the limitation of liability. The most common self-protective measure is, of course, the procurement of additional flight insurance. *See Mertens v. Flying Tiger Line, Inc.*, 2 Cir., 341 F.2d 851, 857." 352 F.2d at 497.

Appellants find comfort in the statement which refers to a purchase "of additional flight insurance," and argue that this imports "insurance united with or joined to insurance formerly purchased and forming one aggregate." We do not agree. The May 11, 1966 agreement between the carriers prescribed the notice or "advice to international passengers on limitation of liability". This notice, among other things, advises a passenger of the $75,000 liability limitation and that liability shall not depend on negligence on the part of the carrier. It further contains the following paragraph:

"Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage, for further information please consult your airline or insurance company representative."

It does not follow that the phrases "additional protection", as used in the agreement, or "additional flight insurance", as used in *Warren*, presuppose that "the protection purchased" by a passenger under its contract of carriage "must in the first place be insurance protection". An international passenger in buying a ticket does not thereby purchase insurance protection. He purchases passage. The language used in the agreement, which must be incorporated in a statement to a passenger, was designed to advise the passenger that on this passage the carrier's liability to him was limited, and to give him an opportunity to protect himself by the purchase of insurance from a private company, if he so desired.

It is significant that at the time the Hague Protocol was being considered an effort was made to alleviate the Hague limitation by adding $50,000 compulsory insurance. It was when this effort failed that the United States gave notice that it would denounce the Warshaw Convention unless the airlines serving the United States agreed by contract to a $75,000 liability limit in accordance with Article 22(1) of the Convention. *See The Warshaw Convention–Recent Developments and The Withdrawal of The United States Denunciation*, 32 J. Air L. & Com., 243, 247 (1966).

Horne v. Insurance Company, 203 Va. 282, 123 S.E.2d 401 (1962) does not support appellants' position. There an employee settled his case with his uninsured mororist carrier. We held that the insurance was coverage that he had separately contracted and paid for to protect him under certain conditions, and that he was entitled to receive the benefit therefrom. Further, the employee there had not reached or recovered from the person who was ultimately responsible for his injuries.

In *Ryan v. General Elec. Co.*, 26 N.Y.2d 6, 307 N.Y.S.2d 880, 256 N.E.2d 188 (1970) and in *Ludeen v. Dept of Labor and Indus.*, 469 P.2d 886 (Wash. 1970) it was held that a Workingmen's Compensation carrier has a lien on payments made by the government under the Military Claims Act on the theory that the Act served as a substitute for a tort recovery, without reference to the negligence or proof of wrong beyond causation, and that as a matter of policy the lien should be extended to such a recovery.

Further, the appellants alleged in their complaint "that the death of said William T. Sheris was caused by the wrongful act, neglect or default of the defendant, British European Airways Corporation". Their action was grounded in tort and the recovery was had on that theory.

The right of the appellees to subrogation is a right expressly provided by Virginia's Workmen's Compensation Act. Admittedly the purpose of the Act is to protect the employee and is liberally construed to that end. The relief afforded an injured employee is fixed, certain and speedy, and the damage he sustains from an accident is treated as a part of the expenses of the business and is to be borne as such. However, the Act permits an injured employee the right to recover from a negligent third party full damages for injuries inflicted on him by such party, and the Act further gives to the employer and his insurance carrier the right to recover from such third party whatever amounts they actually had to pay for the benefit of the injured employee. It takes from the employee the right *pro tanto* to a double recovery, but beyond this it leaves the employee's right to recover as it was before.

While the death of Sheris did occur while he was on a mission for the Sheris Company, and arose out of and during the course of his employment, it was not the negligent act of the Sheris Company, or any breach of its duty to Sheris, that caused the employee's death. His death was occasioned by the crash of an airplane under the control of BEAC, and was therefore due solely to its wrongful act, neglect, default and breach of duty. The party responsible for the death of Sheris is BEAC, and as such it is "the other party" contemplated by Code §65.1-41.

The appellant dependents of William T. Sheris have obtained one full recovery, and the order of the Industrial Commission is

Affirmed.

IN THE
INDUSTRIAL COMMISSION OF VIRGINIA

Opinion by RUSHBROOKE
Deputy Commissioner
Sep. 24, 1970

Hearing before Deputy Commissioner RUSHBROOKE, at Alexandria, Virginia, on March 30, 1970.

William T. Sheris, president of The Sheris Company, died on October 12, 1967 while a passenger on a regularly scheduled passenger flight of British European Airways Corporation which crashed into the Aegean Sea. By written agreement of the parties, it was agreed that the death was by accident arising out of and in the course of the employment and, on the basis of this agreement, our award was entered directing compensation at the rate

of $45.00 per week to Mrs. Maida Ludvik Sheris, widow, for the joint and equal use of herself and the dependents, Christine Elizabeth Sheris and Candace Jo Sheris, in accordance with the provisions of The Virginia Workmen's Compensation Act. Compensation was paid to the dependents of the deceased from the date of death through November 25, 1969, when the insurance carrier filed its application for hearing, alleging that the dependents were in the process of settling a third party claim arising out of the death of the employee in excess of the benefits to which the dependents would be entitled under our Act.

On September 23, 1969, a complaint was filed by the Executors of the Estate of William T. Sheris in the United States District Court for the Eastern District of Virginia for damages on account of the death of William T. Sheris and alleging jurisdiction under the provisions of the Death on the High Seas Act, 46 U.S.C. §761 *et seq.* The employer's workmen's compensation insurance carrier was named as a defendant to this action. On December 12, 1969, judgment was entered in the District Court in favor of the plaintiffs and against British European Airways Corporation in the amount of $75,000.00. Under the Court's apportionment, Christine Elizabeth Sheris and Candace Jo Sheris each received $15,000.00 and the widow of the deceased, Maida Ludvik Sheris, received $34,960.00.

The employer's workmen's compensation carrier now seeks to have the outstanding award of the Industrial Commission vacated and set aside and have its obligation to the dependents terminated on the grounds that the dependents have made one full recovery and that the third party claim was settled to the carrier's prejudice.

The dependents contend that the carrier is not entitled to subrogation under The Virginia Workmen's Compensation Act to the recovery made by the dependents in the action brought in the District Court. It is contended that the liability of the defendant in that action was based on a contractual obligation and that the Virginia Workmen's Compensation Act does not contemplate that the employer can be subrogated to the rights of the dependents against the Airline in this situation.

Section 65.1-41, Code of Virginia, provides in part:

"The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party."

Section 65.1-112, Code of Virginia, says:

"When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all the rights and duties of the employer and may enforce any such rights in its own name or in the name of the injured employee or his or her personal representative; provided, however, nothing herein shall be construed as conferring upon the insurance carriers any other or further rights than those existing in the employer at the time of the injury to his employee, anything in

the policy of insurance to the contrary notwithstanding. No compromise settlement shall be made by the insurance carrier in the exercise of such right of subrogation without the approval of the Industrial Commission and the injured employees or the personal representative or dependents of the deceased employee being first had and obtained."

In §761 of The Federal Death on the High Seas Act (46 U.S.C. §761), it is provided that whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the District Courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husbant, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

It is clear to us that the cause of action under the Death on the High Seas Act is predicated on tort liability rather than contractual liability. In fact, the complaint filed by the Executors of the Estate of the Deceased alleges in Paragraph 7, that the death was caused by the wrongful act, neglect, or default of the defendant. The Warsaw Convention and the agreement providing for increased liability limits and waiver of defenses under the Convention, do not alter the tortious nature of the action brought under the Death on the High Seas Act which affords the remedy. Those carriers signatory to the agreement have simply agreed to accept the principle of liability without fault in an action granted by local law such as the Federal Death on the High Seas Act. The cause of action, however, is conformed not by the Warsaw Convention or agreements pursuant thereto, but by the Death on the High Seas Act.

In *King v. Pan American World Airways,* 270 F.2d 355, a flight service supervisor, employed by the defendant, was killed in the course of his employment when the plane on which he was traveling crashed on the high seas between the United States and Hawaii. The California Workmen's Compensation Act declared that the right to receive compensation in accordance with its terms was the employee's exclusive remedy against the employer and thus it was held that the provisions of that Act abrogated an admiralty remedy against the employer under the Death on the High Seas Act brought by dependents of the deceased.

It is the finding of the Industrial Commission that British European Airways Corporation is an "other party" under the provisions of §65.1-41, Code of Virginia. The making of a claim for compensation, by the express terms of this statute, operated as an assignment to the employer of any right which the personal representatives of the Estate of William T. Sheris had against British European Airways Corporation and as such the employer and its insurance carrier were subrogated to any rights the personal representative could assert against the Airline on account of the death of William T. Sheris. Recovery was apportioned by the District Court to the dependents of the compensation award to such an extent that it is patently clear that these dependents have each had one full recovery as defined by law. See *Hoblin v. Randolph Corp.*, 180 Va. 345, 23 S.E.2d 209; *Stone v. Helme Co.*, 184 Va. 1051, 37 S.E.2d 70.

We cannot find that the claim against British European Airways Corporation was settled without the consent or participation of the workmen's compensation insurance carrier, but we do find that the dependents of the

deceased employee named in the Commission's award have each made one full recovery and for this reason the outstanding award of the Industrial Commission is vacated and set aside as of November 25, 1969, the last day for which compensation was paid.

AWARD

It is Ordered that the outstanding award of the Industrial Commission be, and it hereby is, vacated and set aside as of November 25, 1969, for the reason that the dependents have obtained one full recovery as defined by law.

IN THE
INDUSTRIAL COMMISSION OF VIRGINIA

Opinion by HARWOOD,
Commissioner
Apr. 22, 1971

REVIEW before the full Commission at Richmond, Virginia, on December 1, 1970.

From a decision and award of September 24, 1970, the claimants have appealed, and this case is before the full Commission upon review.

Having maturely considered the record in its entirety, we adopt the findings of fact and conclusions of law of the Deputy Commissioner as those of the full Commission upon review, and the award appealed from is

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 24th *day of* April, 1972.

Maida Ludvik Sheris, Christine Elizabeth Sheris and Candace Jo Sheris, *Appellants,*

against Record No. 7831

The Sheris Co. and Travelers Insurance Company, *Appellees.*

Upon an appeal from an award entered by the Industrial Commission of Virginia on the 22nd day of April, 1971.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the award aforesaid and agruments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the award appealed from. It is therefore adjudged, ordered and decreed that the said award be, and the same is hereby, affirmed, and that the appellants pay to the appellees thirty dollars damages, and also their costs by them expended about their defense herein.

Which is ordered to be certified to the Industrial Commission of Virginia.

A Copy,
Teste:
/s/ Howard G. Turner
Clerk

Appellees' costs:

Attorney's fee $50.00
Cost of printing brief not to exceed $200-Code, §14.1-182

Teste:
/s/ Howard C. Turner Clerk

IN THE
INDUSTRIAL COMMISSION OF VIRGINIA

May 24, 1972

ORDER entered by HARWOOD, Chairman:

The award of the Industrial Commission entered on April 22, 1971, having been affirmed by the Supreme Court of Virginia by mandate of April 24, 1972, it is ordered that the claim be dismissed from the docket.

In accordance with the provisions of the said mandate, it is ordered that the claimants pay to the employer and

its insurer thirty dollars damages and also their costs by them expended about their defense therein, to-wit:

Attorney's fee	$50.00
Cost of printing brief not to exceed	$200.00

INDUSTRIAL COMMISSION OF VIRGINIA
/s/ Thomas P. Harwood, Jr.
Chairman

Attest:
E. M. Scott
Clerk

The following is the Statement of Questions on Appeal which were presented for review and determination by the Supreme Court of Virginia and as they were set forth in Petitioners' original brief before that Court.

QUESTIONS ON APPEAL

Was the final award of the Industrial Commission terminating any further Workmen's Compensation benefits to the widow and dependent children of decedent who was killed in an air crash in international waters while in the course of his employment consistent with law and the evidence where:

(a) the personal representatives recovered a judgment against the air carrier under a controlling federal statute which was designed for the benefit of certain beneficiaries specifically and *exclusively* designated by such statute;

(b) the action, although required to be instituted pursuant to federal law, was predicated upon the Warsaw Convention and certain supplemental agreements among international airlines providing that in the event of a passenger's injury or death the air carrier would be contractually liable within certain prescribed monetary limits without regard to fault; and

(c) the contractual character of the air carrier's undertaking and consequential contractual, as distinguished from tortious, liability was in the nature of a private insurance policy and as such not subject to the subrogation rights of a Workmen's Compensation insurer.

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FILE COPY

FILED
AUG 21 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-127

WILLIAM T. SHERIS (DECEASED), EMPLOYEE,
MAIDA LUDVIK SHERIS, WIDOW, *et al.*,
Petitioners,

v.

THE SHERIS CO., EMPLOYER
TRAVELERS INSURANCE COMPANY, INSURER,
Respondents.

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

WILLIAM T. SHERIS (DECEASED), EMPLOYEE,
MAIDA LUDVIK SHERIS, WIDOW, *et al.*,

Petitioners,

v.

THE SHERIS CO., EMPLOYER
TRAVELERS INSURANCE COMPANY, INSURER,

Respondents.

BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the State of Virginia may terminate the right to compensation under its Workmen's Compensation Act, of beneficiaries who have recovered an amount in excess

of the state compensation benefit in an action brought against an international airline under the Death on the High Seas Act. Stated another way, the question is whether an air carrier whose airliner crashed over international waters resulting in death to an employee is an "other party" within the meaning of Va. Code §65.1-41 (1968 Repl. Vol.).

REASONS FOR DENIAL OF THE WRIT

I. THE VIRGINIA SUPREME COURT HAS INTERPRETED AND APPLIED VIRGINIA LAW, AND THERE IS NO FEDERAL QUESTION INVOLVED

The Workmen's Compensation insurance carrier is subrogated to the right of the personal representative of a deceased employee covered under the Workmen's Compensation Act to any right the personal representative " . . . may have against any other party for such injury or death . . . " . Virginia Code, §65.1-41 (1968 Repl. Vol.). The employee is not entitled to double recovery and if the employee or his personal representative makes a settlement of the action against the other party which results in recovery in excess of the amount to which the employee or his personal representative would be entitled under the Workmen's Compensation Act, further entitlement to compensation ceases. *Stone v. George W. Helme Co.*, 184 Va. 1051, 37 S.E.2d 70 (1946). There is no dispute that the personal representative of Mr. Sheris recovered an amount in excess of the amount to which the personal representative would be entitled under the Workmen's Compensation Act in a lawsuit against British European Airways Corporation in the United States District Court for the Eastern District of Virginia.

A fair reading of the opinion of the Virginia Supreme Court demonstrates that the decision in the instant case does not draw into question the validity of a treaty or statute of the United States. Workmen's compensation benefits are purely a creature of the state statute. The state legislature establishes the grounds for both origin and termination of benefits. The opinion of the Virginia Supreme Court holds only that compensation terminates when the beneficiary receives a certain amount from an "other party", and that the term "other party" includes an international air carrier whose airliner crashes over foreign waters. Manifestly, if a state may declare that its workmen's compensation statute is the exclusive remedy of an employee so as to preclude his right of action under the Death on the High Seas Act, Virginia may declare that workmen's compensation benefits cease when there has been sufficient recovery under the Death on the High Seas Act. See *King v. Pan American World Airways*, 270 F.2d 355 (9th Cir. 1959); *cert. den.* 362 U.S. 928, 80 Sup. Ct. 753, 4 L.Ed. 2d 746 (1960). The interpretation of a state statute by the highest court in the state is not reviewable by this Court. *Copperweld Steel Co. v. Industrial Commission of Ohio*, 324 U.S. 780, 65 Sup. Ct. 1006, 89 L.Ed. 1363 (1945).

II. THE VIRGINIA SUPREME COURT CORRECTLY DECIDED THAT AN ACTION AGAINST AN AIRLINE COVERED BY THE WARSAW CONVENTION BROUGHT IN A UNITED STATES DISTRICT COURT UNDER THE DEATH ON THE HIGH SEAS ACT TO RECOVER DAMAGES FOR THE DEATH OF A PASSENGER IS AN ACTION AGAINST AN "OTHER PARTY" AS DEFINED IN THE VIRGINIA WORKMEN'S COMPENSATION ACT

The Complaint which instituted the action against BEAC was brought under the provisions of the Death on the High Seas Act, 46 U.S.C. §761, *et seq.* and alleged that the death of Mr. Sheris " . . . was caused by the wrongful act, neglect or default of the defendant, British European Airways Corporation . . . " . The allegation, of course, conforms to the language of the Death of the High Seas Act. It is manifest that the action against British European Airways Corporation is such as is contemplated by the Workmen's Compensation Act against an "other party" and since the personal representative has recovered in that action, further right to compensation ceases, unless there is some peculiarity of the circumstances which takes the case out of the general rule.

Petitioners' attempt to remove this case from the general rule of subrogation by arguing that the fact that a treaty between nations known as the Warsaw Convention, 49 Stat. 3000 *et seq.* applies to the flight upon which Mr. Sheris was killed, makes the action against the air carrier one of personal insurance contract to which the Workmen's Compensation insurer would not be subrogated.

In a situation involving travel on an airline, there is no evidence to reveal that the passenger separately contracts

for or purchases insurance coverage. What the passenger purchases is flight from one place to another. When the flight is interrupted by a crash causing the death of the passenger, he brings his action under the Death on the High Seas Act, which is the federal version of a wrongful death statute. The fact that the employee may couch his pleading in terms indicating a breach of contract of carriage does not change the basic nature of the action.

It has been expressly held that the Warsaw Convention does not create an independent right of action. The Convention leaves it to local law to grant such a right of action. *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *cert. den.* 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed. 2d 262 (1957). The Warsaw Convention merely sets up a limitation on the amount to be collected and certain other conditions for and limiting recovery in an action involving international flights. As is stated by a recent writer on the subject: "The liability of an air carrier under the Warsaw Convention is based upon the concept of fault." Tompkins: The Warsaw Convention–Proposed Revisions, VI The Forum, No. 3 (April, 1971) at p. 154. The fact that the Convention shifts the usual burden of proof and removes certain defenses from the air carrier does not change the concept of tort liability, nor the nature of the action under the Death on the High Seas Act.

It is not contested that the carrier would not be subrogated to the employee's rights under a private insurance policy. To call a treaty between nations a private insurance policy stretches the imagination to the breaking point.

CONCLUSION

Wherefore, respondents respectfully pray this Court to deny the Writ.

Respectfully submitted,

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